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No. 82-669

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

SIDNEY L. SOFFER,

Petitioner,

vs.

CITY OF COSTA MESA, JAMES T. WEIR and ROBERT R. CAMPAGNA,

Respondents.

On Petition for Writ of Certiorari
To The United States Court of Appeals
For The Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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COUNTER-STATEMENT OF QUESTIONS PRESENTED

1. Whether Respondent City of Costa Mesa was constitutionally compelled to hold a pre-nuisance-abatement hearing before towing and temporarily storing three inoperative motor vehicles which Petitioner Sidney Soffer had illegally parked in full public view on his front lawn, despite the fact that the City spent weeks trying to resolve the matter informally with Petitioner and then gave Petitioner 14 days' formal written notice of the opportunity for a hearing but received no timely or proper hearing request from him?

2. Whether Petitioner should reasonably have understood that a motor vehicle which could not legally be driven because it did not display valid license

plates and registration was "inoperative" within the meaning of the City of Costa Mesa Ordinance No. 73-13?

3. Whether the judgment for Respondents in this civil rights action was in any event correct because the jury necessarily found that Petitioner maintained a public nuisance, that Respondent James Weir acted reasonably and in good faith in abating the public nuisance, that Respondent Robert Campagna had nothing to do with the temporary removal of Petitioner's motor vehicles, that any alleged injury was not the result of an established governmental policy or custom by Respondent City of Costa Mesa, and that Petitioner in fact suffered no compensable injury?

4. Whether this Court should even consider the petition for certiorari

which is based on facts not supported by the incomplete appellate record and which seeks interpretation of state laws unrelated to any federal constitutional claim?

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RESPONDENTS' BRIEF IN OPPOSITION

COUNTER-STATEMENT OF THE CASE

1. The Action.

In this civil rights action, Petitioner Sidney Soffer claimed $157.50 in out-of-pocket losses plus general and punitive damages against Respondents James Weir, Robert Campagna, and the City of Costa Mesa, California.

2. The Ordinance.

At issue was City of Costa Mesa Ordinance 73-13. (Appendix D to Petition for Certiorari.) This nuisance-abatement ordinance declared that dismantled, abandoned or inoperative motor vehicles which were stored in public view reduced the value of private property, promoted blight and deterioration, invited plundering, created fire hazards, were attractive nuisances, harbored rodents and insects, were injurious to the public health, safety and general welfare, and therefore were public nuisances. (Section 1.) The City was required to give the owners of both the property and the vehicle 10 days' written notice of intention to abate the public nuisance. (Section 8.) If a request was received from an owner within

10 days, the City was required to hold a pre-abatement hearing and take evidence on the propriety of the abatement. (Section 9.) The ordinance required residents to obtain a permit to store any vehicle which did not qualify under state law to be operated on the highways. (Section 20.)

3. **The Facts.**

The evidentiary facts stated in the petition for certiorari are not supported by the incomplete appellate record. The partial reporter's transcript and exhibits actually show the following facts:

In response to neighborhood homeowners' complaints, on October 12, 1977, Respondent James Weir, a Costa Mesa zoning officer, inspected three dusty old automobiles which were parked in

public view in Petitioner's front yard and which had not been driven for some time. None of the vehicles had visible license plates or current registration. (R.T. 12-13; Trial Exhibits A, B, C, F, G, H and I.)

Weir spoke with Petitioner about the public nuisance. Petitioner said he wanted to discuss the matter with the City Attorney and asked Weir for the number of the applicable city ordinance. On October 18, 1977, Weir left Petitioner the number. (R.T. 8-9.)

Meanwhile, Weir checked with the motor vehicle department but found no current records on Petitioner's vehicles. (R.T. 12-13; Trial Exhibits A, B and C.) Based on the physical condition of the vehicles and the fact that without valid licenses and registrations

they could not legally be operated on the streets (California Vehicle Code §4000), Weir determined the vehicles were inoperative and constituted a public nuisance within the meaning of City of Costa Mesa Ordinance 73-13. (R.T. 11-13, 35.)

Hearing nothing from Petitioner for more than a week, on October 25, 1977, Weir issued Petitioner three written notices of the City's intention to abate the nuisances. Each notice explained that Petitioner had 10 days to request a public hearing and if he failed to initiate such a request within 10 days the City would abate the nuisance without a hearing. (R.T. 9; Trial Exhibits A, B and C; see Appendix C to Petition for Certiorari.)

On November 8, 1977, 14 days after the notices were issued, no request for a hearing had been received and the vehicles were still parked in Petitioner's front yard. Petitioner refused to discuss the matter (R.T. 43), so Weir had the vehicles towed and temporarily stored out of public view. (R.T. 16-17.) Petitioner then claimed he had requested a hearing, and he telephoned Respondent Robert Campagna, the City Attorney, as the vehicles were being towed away. (R.T. 16-18.)

Later that same day, the City received in the mail copies of Petitioner's three abatement notices on which the printed phrase "request a public hearing" had been circled. There were no other markings or signatures on the copies and nothing to indicate they came

from Petitioner or were intended to constitute a request for a hearing. (Trial Exhibits A, B and C.)

Three days later Petitioner paid $127.50 to reimburse the City for towing and storage charges (Trial Exhibit A), and he allegedly spent $30.00 more to tow his vehicles back to his front yard.

4. The Jury Trial.

The District Court refused to instruct the jury that if Petitioner's motor vehicles did not constitute public nuisances then Respondents denied him due process of law. (Petitioner's Requested Instruction D.) The court did instruct the jury:

> "At a minimum, due process requires that a person be given notice and a prior opportunity to be heard absent an emergency or extraordinary situation before

his property is taken." (Petitioner's Requested Instruction C.)

The jury returned a general verdict in favor of all Respondents.

REASONS FOR DENYING THE PETITION

1. The District Court And Court Of Appeals Fully Acknowledged Petitioner's Right To Notice And Opportunity For Hearing Prior To Abatement Of The Public Nuisance He Maintained.

Contrary to Petitioner's assertion, the Courts below did not interpret due process as "something less" than prior notice and opportunity for hearing. (Petition, pp. 14-15.) In fact, the District Court specifically instructed the jury as follows (Petitioner's Requested Instruction C):

"At a minimum, due process requires that a person be given

notice and a prior opportunity to be heard absent an emergency or extraordinary situation before his property is taken."

Similarly, the decision of the Court of Appeals held (Appendix A to Petitioner for Certiorari, pp. 6-7):

> "The Due Process Clause requires that parties whose rights are to be affected are entitled to be notified of the proposed action and they are entitled to be heard. [Citations.] It is also a fundamental requirement of due process that the opportunity to be heard be granted 'at a meaningful time and in a meaningful manner.' [Citations.]"

2. Due Process Does Not And Should Not Require A Hearing Prior To Abatement Of A Public Nuisance Where Ample Notice Of The Right To A Pre-Abatement Hearing Is Given And No Hearing Is Requested.

Petitioner's fundamental argument is that he was entitled to a hearing before

the City towed away the inoperative vehicles from his front lawn whether or not he requested such a hearing. (Petition, pp. 16-20.)

This is clearly not the law nor has any case so held. The due process clause does not even necessarily require that the opportunity for a prior hearing be given before property is seized. (**Calero-Toledo v. Pearson Yacht Leasing Co.**, 414 U.S. 663, 678-679, 40 L.Ed.2d 462, 94 S.Ct. 2080, 2089 (1973); **Parratt v. Taylor**, 451 U.S. 517, ___ L.Ed.2d __, 101 S.Ct. 1908, 1915 (1981).) Thus, **Sutton v. City of Milwaukee**, 672 F.2d 644, 645 (7th Cir. 1982), holds that a city does not violate due process by towing an illegally parked car without first giving the owner notice and opportunity to be heard. Similarly, **Stypmann**

v. City & Cty. of San Francisco, 557 F.2d 338 (9th Cir. 1977), acknowledges that in the towing of illegally parked cars due process may be satisfied by a post-seizure hearing. (See also, Mitchell v. W. T. Grant Company, 416 U.S. 600, 611, 40 L.Ed. 406, 94 S.Ct. 1895, 1902 (1974) ["The usual rule has been '[w]here only property rights are involved, mere postponement of the judicial inquiry is not a denial of due process, if the opportunity given for ultimate judicial determination of liability is adequate.'"].)

Even if due process necessarily required the opportunity for a hearing prior to abatement of a public nuisance, such a hearing could reasonably be conditioned on a timely request. It would be an absurd waste of public resources

to require a hearing on the abatement of each and every public nuisance even if no one wanted a hearing. This is particularly true in cases such as this where, in the vast majority of instances, no one would contest the removal of an abandoned or inoperative motor vehicle.

This case is far afield from **Doe v. Gallinot**, 486 F.Supp. 983 (C.D. Cal. 1979), affirmed in **Doe v. Gallinot**, 657 F.2d 1017 (9th Cir. 1981), on which Petitioner principally relies. That case involved the involuntary incarceration of a person who was allegedly gravely disabled due to a mental disorder. The Court held that due process may require a hearing even without a request "where potential deprivation is severe and the risk of error is great."

(486 F.Supp. at 983.) Those circumstances simply do not exist here. The potential deprivation is not in the involuntary physical incarceration of Petitioner's person, but in the miniscule property loss, if any, caused by the temporary storage of his three inoperative motor vehicles. The risk of error is not in the highly-subjective determination of disability and mental disorder, but in the highly-objective determination whether an automobile is inoperative. 1/

1/ Petitioner cites a District Court opinion in **Geanacos v. Nelson**, C-74-2406 RFP and **Kemp v. Gain**, C-75-0993 RFP from the Northern District of California. That unpublished "Memorandum for Motion for Class Certification and Cross-Motion for Summary Judgment" is not properly cited as precedent. In any event, the memorandum notes that in the case of a city towing cars left on the street for more than 72 hours, notice of the right to a hearing was the crucial (continued)

As the decision of the Court of Appeals correctly points out, the requirements of due process vary with the subject matter and circumstances of each case. (**Fuentes v. Shevin**, 407 U.S. 67, 32 L.Ed.2d 556, 92 S.Ct. 1983, 1996 (1972); **Youngberg v. Romeo**, _____ U.S. ___, ____ L.Ed.2d ____, 102 S.Ct. 2452, 2460 (1982).) The law does not require the use of a sledge hammer where a fly swatter will do. No case has ever ruled, nor should the due process clause require, that a hearing must be held,

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1/ (continued) factor, not the hearing itself: "An advice containing the description of the violation asserted and of the hearing provided, together with a warning that failure to take advantage of the hearing within 24 hours [sic], securely affixed to a clearly visible place on the vehicle, should be adequate notice." (Memorandum, at p. 23.)

whether or not requested following ample notice of the right to request a hearing, before an inoperative motor vehicle which constitutes a public nuisance may be towed and temporarily stored.

3. The Jury Verdict And Decision And The Court Of Appeals Are Obviously Correct And Present No Basis For Review By This Court.

The general verdict for the defense in this case necessarily implies that the jury found the individual Respondents acted reasonably and in good faith in abating the nuisance; that any alleged denial of civil rights was not the result of a custom or policy of Respondent City of Costa Mesa; that Petitioner did not in fact properly request a pre-abatement hearing after he was given ample notice; that even if there had

been a pre-abatement hearing the three inoperative vehicles would still have been declared a public nuisance; and that, in any event, Petitioner suffered no compensable damage as a result of the alleged violation of civil rights. Thus, even if Petitioner were correct on his due process claim, which he is not, the judgment is nevertheless proper and does not merit this Court's attention.

CONCLUSION

The petition for certiorari presents no new or important issues. Petitioner's case was fairly tried and correctly decided in light of well-established principles of constitutional and statutory law. Accordingly, the petition should be denied.

Respectfully submitted,

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